STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of OMAR DONALD, Minor.

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

OMAR DONALD,

Respondent-Appellant,

and

CHRISTINA DONALD,

Respondent.

UNPUBLISHED
November 6, 2003

No. 247420
Oakland Circuit Court
Family Division
LC No. 02-668302-NA

FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

CHRISTINA DONALD,

Respondent-Appellant,

and

OMAR DONALD,

Respondent.

No. 247519
Oakland Circuit Court
Family Division
LC No. 02-668302-NA

Before: Fitzgerald, P.J., and Zahra and Hood, JJ.

PER CURIAM.

Respondents Omar Donald and Christina Donald appeal as of right the order terminating their parental rights to the minor child pursuant to MCL 712A.19b(3)(l). We affirm that part of the order terminating respondent mother's parental rights, but reverse that part of the order terminating respondent father's parental rights and remand for further proceedings.

Respondent mother gave birth to the minor child, Omar Donald (hereafter "OD"), after her parental rights to two other children were terminated in Ohio pursuant to adjudicative and dispositional proceedings that resulted in the children being committed to the permanent custody of the Cuyahago County Department of Child and Family Services (CCDCFS) under Ohio Revised Code, § 2153.353(A)(4). According to court documents, the first child was adjudicated a dependent child under Ohio Revised Code, § 2151.04, and then committed to the permanent custody of CCDCFS in 2000. The second child was born in March 2001. She was also adjudicated a dependent child and then committed to the permanent custody of CCDCFS in April 2002.

Respondent father married respondent mother after she gave birth to her second child in Ohio. Respondent father was one of two men alleged to be the father of the second child in the Ohio proceedings. According to court documents, the other man informed the court in May 2001 that he was waiving his right to counsel and he voluntarily agreed to grant permanent custody of the child to the CCDCFS. Respondent father had already been joined as a party in that proceeding due to his recent marriage to respondent mother. Although respondent mother stated on the record in February 2002, that respondent father was the only known alleged father of her second child, respondent father never established his paternity. At the time of the Ohio court's April 30, 2002, journal entry that resulted in the termination of "all parental rights" and the commitment of the second child to the permanent custody of the CCDCFS, the court found that the second child "cannot and should not be placed with either parent within a reasonable time" because respondent mother knowingly and voluntarily agreed with granting permanent custody to the CCDCFS and the "alleged father has failed to appear though duly served and has failed to establish paternity of said child."

After respondent mother gave birth to OD in Michigan in July 2002, petitioner, acting on information concerning the Ohio proceedings involving respondent mother's other two children, as well as interviews with respondents, petitioned the court to exercise jurisdiction over OD, who was placed in the care and custody of petitioner pending proceedings on the petition. The petition was subsequently amended to request termination of respondents' parental rights to OD under MCL 712A.19b(3)(l) and (m) at the initial dispositional hearing. Following adjudicative and dispositional proceedings before a referee, an order was entered terminating respondents' parental right to OD under MCL 712A.19b(3)(l) only.

In these consolidated appeals, both respondents raise a number of constitutional and statutory challenges to the referee's findings. We note that neither respondent took advantage of the opportunity to request judicial review of the referee's recommended findings and conclusions as provided by MCR 5.991.[1] Nonetheless, having considered respondents' arguments on appeal,

[1] The court rules governing child protective proceedings were amended and recodified as part of new MCR subchapter 3.900, effective May 1, 2003. This opinion generally refers to the rules in
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we conclude that respondent father has presented one issue warranting reversal of the order terminating his parental rights.

The burden was on petitioner to establish a statutory ground for termination by clear and convincing evidence. MCR 5.974(D)(3)(c). We review the trial court's findings of fact under the clearly erroneous standard. MCR 5.974(I); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). We review questions of law de novo. *In re AMB*, 248 Mich App 144, 165; 640 NW2d 262 (2001).

We agree with respondent father that the referee erred in finding that termination of his parental rights was justified under MCL 712A.19b(3)(l).[2] We conclude that the applicability of § 19b(3)(l) was not established by clear and convincing evidence because petitioner failed to prove that respondent father properly could be considered a "parent" of respondent mother's second child.

Termination under § 19b(3)(l) requires proof that a parent's rights to another child were terminated as a result of proceedings under MCL 712A.2(b) or a similar law of another state. In this case, the trial court relied on the Ohio termination proceedings involving respondent mother's second child as the factual basis for its determination that § 19b(3)(l) was proven with respect to respondent father. Thus, in the context of this case, we must determine whether the evidence concerning the Ohio proceeding established, with respect to respondent father, that a parent's rights to another child were terminated within the meaning of § 19b(3)(j).

When construing a statute, a court's primary objective is to ascertain the legislative intent that may be reasonably inferred from the words expressed therein. *G C Timmons & Co v Guardian Alarm Co*, 468 Mich 416, 420; 662 NW2d 710 (2003). Although the Legislature has not defined "parent" in the Juvenile Code, this Court has looked to the definition of "parent' in former MCR 5.903(A)(12) [now MCR 3.903(A)(12)]. See *In re Gillespie*, 197 Mich App 440, 444; 496 NW2d 309 (1992). The rule defines a "parent" as a "person who is legally responsible for the control and care of the minor, including a . . . father." MCR 5.903(12).

Michigan, like Ohio, provides procedures for an alleged or putative father to be legally recognized as the father of a child born out of wedlock. See MCR 5.903; *In re Gillespie, supra* at 444-445. See also *Brookbank v Gray*, 74 Ohio St 3d 279; 658 NE2d 724 (1996); Ohio Revised Code, §§ 3110.04 and 3111.03(3). Although a putative father in Michigan is generally afforded an opportunity to assert his parental rights in a child protection proceeding, the putative father's rights differ from those of a legally recognized parent. *In re Gillespie, supra* at 446; MCR 5.921(D). See also *In re CAW*, 469 Mich 192; 665 NW2d 475 (2003).

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effect at the time of the trial court's decision.

[2] Although respondent father couches this issue in terms of a due process error, we note that his argument is silent with regard to the basis for the alleged due process violation. Because respondent father's argument is directed at the sufficiency of the proofs, we have treated his claim as involving only the constitutional requirement for clear and convincing evidence embodied in MCL 712A.19b(3). See *In re Snyder*, 223 Mich App 85, 89; 566 NW2d 18 (1997), citing *Santosky v Kramer*, 455 US 745; 102 S Ct 1388; 71 L Ed 2d 599 (1982).

In this case, testimony was presented regarding whether respondent father *believed* that he was the natural father of respondent mother's second child, and whether respondents *believed* that respondent father's parental rights to that child were terminated in the Ohio proceeding. Nonetheless, the documentary evidence from the Ohio proceeding established that "all parental rights" to respondent mother's second child were terminated at a time when respondent father had not established his paternity. Indeed, the referee here referred to respondent father as having been treated only as the "alleged" father in the Ohio proceeding. We conclude that the referee erred as a matter of law by equating respondent father's status as an alleged father in the Ohio proceeding as sufficient to establish that he was a "parent" whose parental rights were terminated within the meaning of § 19b(3)(l). Without a determination of paternity to establish that respondent father could legally be recognized as the previous child's father, or at least a judicial finding by the Ohio court that respondent father was the child's natural father, there could be no parental rights to that child that would be subject to termination for purposes of applying § 19b(3)(l).

Because the referee clearly erred in finding clear and convincing evidence that § 19b(3)(l) was proven with respect to respondent father, we reverse the order terminating his parental rights and remand for further proceedings.

Respondent father's remaining claims do not warrant relief. Respondent father's equal protection challenge to § 19b(3)(l) was not preserved for appeal because it was not raised in the trial court. In any event, respondent father's reliance on MCL 722.638 to establish two classes of parents is without merit because MCL 722.638 does not itself authorize termination of parental rights, or establish criteria for termination, but rather sets forth circumstances in which a petitioner is required to submit a petition or request termination. See *In re AH*, 245 Mich App 77; 627 NW2d 33 (2001). Respondent father has not established an equal protection violation. *In re RFF*, 242 Mich App 188, 204-205; 617 NW2d 745 (2000).

Respondent father's claim that his due process rights were violated because he was not given sufficient time to parent OD is not properly before us because it was not presented to the trial court and also lacks citation to supporting authority. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). In any event, the Legislature has authorized termination of parental rights at the initial dispositional hearing. MCL 712A.19b(4). Statutes are construed as constitutional if possible. *In re Trejo*, 462 Mich 341, 355; 612 NW2d 407 (2000); *In re RFF*, *supra* at 205. Respondent father has failed to establish any basis for finding MCL 712A.19b(4) to be constitutionally infirm.

Although respondent father asserts that he has a constitutional right to parent, a parent's liberty interest in a child is not absolute, but may give way to other important interests. The child's welfare is primary in a child protection proceeding. *In re Brock*, 442 Mich 101, 115; 499 NW2d 752 (1993). See also *In re Trejo*, *supra* at 355. Respondent father's mere assertion that he has a constitutional right to parent, standing alone, affords no basis for relief.

In light of our decision to reverse the order terminating respondent father's parental rights, it is unnecessary to address respondent father's claim regarding the referee's best interest determination under MCL 712A.19b(5).

With respect to respondent mother, the referee did not clearly err in finding that termination of her parental rights was warranted under § 19b(3)(j), given the court documents regarding the termination of her parental rights to each of her two other children in Ohio. MCR 5.974(I); *In re Sours,* 459 Mich 624, 633; 593 NW2d 520 (1999), *In re Miller, supra.*

We reject respondent mother's interpretation of § 19b(3)(l) as containing an unstated "current risk of harm" element. We also reject respondent mother's newly raised claim that § 19b(3)(l) is unconstitutionally vague on its face or as applied to her circumstances. "[A]n analysis of a void-for-vagueness claim requires an examination of the entire text of the applicable statute." *People v Munn,* 198 Mich App 726, 727; 499 NW2d 459 (1993). The use of the permissive word "may' in MCL 712A.19b(3), read in conjunction with MCL 712A.19b(5), does not give a court unstructured and unlimited discretion when determining whether to terminate parental rights after one or more statutory grounds for termination have been proven. *People v Noble,* 238 Mich App 647, 651; 608 NW2d 123 (1999); *In re Gentry,* 142 Mich App 701, 709; 369 NW2d 889 (1985).

Further, respondent mother's reliance on *In re Boursaw,* 239 Mich App 161; 607 NW2d 408 (1999), and *In the Matter of Mason,* 140 Mich App 734, 736; 364 NW2d 301 (1985), to argue that her parental rights were terminated prematurely is misplaced, because neither of those cases involved termination of parental rights at the initial dispositional hearing or termination under § 19b(3)(j). Because only one statutory ground for termination is required and the referee did not clearly err in finding that § 19b(3)(l) was established, termination of respondent mother's parental rights was mandatory absent clear evidence, on the whole record, that termination was not in OD's best interests. *In re Trejo, supra* at 354.

With regard to the referee's application of § 19b(5) at the best interest hearing, we agree with respondent mother that the referee erroneously allocated the burden of producing best interest evidence on respondent mother. Neither respondent mother nor petitioner had the burden of producing additional evidence. *In re Trejo, supra* at 352-254. We conclude that respondent mother failed to preserve this issue for appeal, however, because she did not object to the referee's instruction at the close of the December 16, 2002, adjudicative hearing that respondents would have the burden of producing evidence at the best interest hearing, nor did she object at the best interest hearing itself. A timely objection would have given the referee an opportunity to correct the error. "Counsel may not harbor error as an appellate parachute." *People v Carter,* 462 Mich 206, 214; 612 NW2d 144 (2000).

In any event, it is apparent that the referee's error was harmless. The record reflects that the referee received additional evidence at the best interest hearing, including testimony from respondent father and the doctor who performed psychological evaluations on each respondent. The best interest hearing effectively served respondent mother's interests by affording her an opportunity to avoid termination, despite the existence of a statutory ground for termination. *In re Trejo, supra* at 356. Further, the referee's ultimate decision did not rest on which party had the burden of producing evidence, but rather on her determination that there was no evidence establishing that termination of respondent mother's parental rights was clearly not in OD's best interests. Under these circumstances, our refusal to reverse based on this unpreserved claim regarding the burden of proof is not inconsistent with substantial justice. See MCR 5.902(A) [limitations on the correction of error are governed by MCR 2.613(A)], and MCR 2.613(A) [a

trial court's error is not grounds for reversal unless refusal to take the action would be inconsistent with substantial justice].

Limiting our review to the record developed below, we cannot conclude that the referee clearly erred in her best interest determination. MCL 712A.19b(5); *In re Trejo, supra.*

Reversed in part and remanded for further proceedings not inconsistent with this opinion. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood